

**United States Department of Labor
Employees' Compensation Appeals Board**

T.P., Appellant

and

**U.S. POSTAL SERVICE, JACKSON PARK
STATION, Chicago, IL, Employer**

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**Docket No. 10-2186
Issued: July 22, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from an April 15, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the denial of her claim. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an injury to her right shoulder in the performance of duty, causally related to factors of her federal employment.

On appeal, appellant contends that OWCP denied her claim based on misinformation. She alleged that OWCP approved presurgery physical therapy, injection, magnetic resonance imaging (MRI) scan and electromyogram as well as surgery on her right shoulder, which was the

¹ 5 U.S.C. § 8101 *et seq.*

incorrect shoulder. Appellant alleged that OWCP denied therapy for her right shoulder after the surgery. She requested that her claim be reevaluated and approved.

FACTUAL HISTORY

On July 3, 2009 appellant, then a 42-year-old clerk, filed an occupational disease claim alleging that, as a result of lifting and carrying tubs and packages and unloading and loading trucks at work, she sustained right shoulder impingement.

In support of her claim, appellant submitted a medical report by Dr. Howard Robinson, a Board-certified physiatrist, who interpreted an MRI scan of her right shoulder obtained on November 5, 2008 as showing mild supraspinatus, infraspinatus and subcapularis tendinosis without evidence of rotator cuff tear. Dr. Robinson also found a curved undersurface to the acromion and mild acromioclavicular degenerative change.

In a May 4, 2009 note, Dr. Joseph Thometz, appellant's treating Board-certified orthopedic surgeon, noted that she sustained an injury to her right shoulder on May 12, 1999 when a bulk mail carrier (BMC) fell onto her shoulder. He reviewed her MRI scans and complaint of persistent shoulder pain which had been symptomatic for 10 years. Dr. Thometz planned an arthroscopic evaluation and treatment and subacromial decompression. In a June 11, 2009 operative report, he noted that appellant's diagnosis was right shoulder impingement syndrome and that he performed an arthroscopy and subacromial decompression. In a July 1, 2009 report, Dr. Thometz noted that he first saw appellant on May 4, 2009. He noted that her right shoulder was injured when a BMC fell onto her shoulder. Dr. Thometz stated that appellant had persistent shoulder pain and was symptomatic for 10 years. He stated that she had full conservative measures and on June 11, 2009 he proceeded with a right shoulder arthroscopy with subacromial decompression.

By letter dated July 29, 2009, OWCP requested that appellant submit further information.

In an August 11, 2009 note, Stephanie Hartman, a manager for the employing establishment, indicated that appellant was a rehabilitation clerk whose work consisted of distributing mail to carriers' cases and working on the window. She noted that appellant had a prior injury and appellant should have notified management if she needed assistance. Ms. Hartman further noted that appellant never worked alone. She contended that she did not see how it was possible that an injury occurred as appellant alleged.

In a July 20, 2009 report, Dr. Thometz diagnosed status post subacromial decompression. He noted that appellant was given a new prescription of therapy and opined that she was not capable of work yet. In an August 17, 2009 note, Dr. Thometz recommended that she start therapy as she was making slow progress on her own and stated that therapy would be most beneficial to keep her from developing adhesions.

In a decision dated September 28, 2009, OWCP denied appellant's claim as it found that the medical evidence did not demonstrate that the claimed medical condition was related to the established work-related event.

On October 2, 2009 appellant requested an oral hearing.

In an October 19, 2009 note, Dr. Thometz stated that appellant has been under his care for a work-related injury that happened on May 12, 2009 when a BMC door fell onto her shoulder.² Based on appellant's description of the injury, her need for treatment and ongoing difficulties started after her injury. Dr. Thometz attributed her right shoulder impingement syndrome to her injury. He noted that appellant developed a post-traumatic tendinitis that failed to resolve with conservative measures. Appellant underwent surgery for this condition in June 2009 and was currently undergoing a physical therapy program.

At the hearing held on January 27, 2010, appellant testified that in 1999 she injured her left shoulder when a BMC struck it. She received minimal medical treatment for that condition. Appellant noted that, the current claim involved her right shoulder supported that it prior to filing for claim, she worked limited duty because she had carpal tunnel syndrome of both wrists. Her duties involved working for three hours lifting mail tubs and taking them to carrier's case and pushing all-purpose containers. Appellant also worked an hour a day on the window, where she lifted packages of up to 25 pounds. She contended that her disability from June 11 through December 7, 2009 was due solely to her shoulder injury.

In a February 5, 2010 medical report, Dr. Thometz noted that appellant completed physical therapy in December 2009 and she was doing reasonably well despite discomfort through the anterior aspect of her right shoulder. He stated that, in the course of her work duties, she was required to continuously push and pull tubs of mail and transport them to the letter carriers. These activities contributed to appellant's right shoulder condition and required surgical intervention.

By decision dated April 15, 2010, the hearing representative affirmed the September 28, 2009 decision. While OWCP had previously accepted appellant's claim for bilateral carpal tunnel syndrome in File No. xxxxxx055, there was no record of an accepted right shoulder injury sustained in 1999.

LEGAL PRECEDENT

An employee seeking compensation under FECA³ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,⁴ including that he is an "employee" within the meaning of FECA⁵ and that he filed his claim within the applicable time limitation.⁶ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally

² The references by Dr. Thometz in this report to the BMC falling on appellant on May 12, 2009 appears to be an error. In prior reports, he noted that this incident occurred on May 12, 1999. In his first report of May 4, 2009, Dr. Thometz references the May 12, 1999 incident and noted that appellant had been symptomatic for 10 years.

³ 5 U.S.C. §§ 8101-8193.

⁴ *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

⁵ *See M.H.*, 59 ECAB 461 (2008); *Emiliana de Guzman (Mother of Elpedio Mercado)*, 4 ECAB 357, 359 (1951); *see* 5 U.S.C. § 8101(1).

⁶ *R.C.*, 59 ECAB 427 (2008); *Kathryn A. O'Donnell*, 7 ECAB 227, 231 (1954); *see* 5 U.S.C. § 8122.

related to the employment injury.⁷ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁸

To establish that an injury was sustained in the performance of duty in a claim for occupational disease, an employee must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the employee.⁹

Causal relationship is a medical issue¹⁰ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,¹¹ must be one of reasonable medical certainty¹² and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.¹³

It is well established that, where employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the period of disability related to the aggravation. Where the medical evidence supports an aggravation or acceleration of any underlying condition precipitated by working conditions or injuries, such disability is compensable.¹⁴

ANALYSIS

The Board finds that appellant failed to establish her claim of a right shoulder condition. Appellant alleged that she sustained a right shoulder condition as a result of lifting and carrying tubs and packages of mail as well as loading and unloading trucks at work.

The Board notes that the medical evidence of record provides an inconsistent history as to how appellant sustained a right shoulder injury. Appellant received treatment for a right

⁷ *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁸ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁹ *See Roy L. Humphrey*, 57 ECAB 238, 241 (2005); *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

¹⁰ *Mary J. Briggs*, 37 ECAB 578 (1986).

¹¹ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

¹² *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

¹³ *See William E. Enright*, 31 ECAB 426, 430 (1980).

¹⁴ *A.C.*, Docket No.08-1453 (issued November 18, 2008).

shoulder injury from Dr. Thometz beginning May 4, 2009. Dr. Thometz stated that she was injured on May 12, 1999 when a bulk mail carrier fell onto her shoulder. He noted that appellant's right shoulder remained symptomatic for 10 years. On June 11, 2009 Dr. Thometz performed a right shoulder arthroscopy and subacromial decompression. In subsequent reports dated July 1 and October 19, 2009, he reiterated that appellant injured her right shoulder in 1999 when a BMC fell onto her shoulder. At the hearing, however, appellant testified that the BMC actually fell on her left shoulder. Dr. Thometz does not address whether repeated lifting and carrying tubs and packages of mail or loading and unloading trucks at work caused or contributed to her right shoulder condition. It is not until his report of February 5, 2010, 10 months after his first report, that he noted that appellant's work activities contributed to her right shoulder injury. Dr. Thometz did not explain the basis for change as to how appellant injured her shoulder.

In a February 5, 2010 report, Dr. Thometz indicated that appellant was required to continuously push and pull tubs of mail and to transport them to letter carriers. He opined generally that this activity contributed to her shoulder condition and necessitated surgery; however, the employing establishment advised that she worked in a "rehab assignment" which consisted of distributing mail to carrier cases and working the window. If appellant had to lift anything heavy, she was to seek assistance. She testified at the hearing that since 1999 she had not worked regular duty but performed limited duty based on her accepted carpal tunnel syndrome. Appellant noted that she had to pull tubs and put mail in carrier cases for three hours a day. She worked at the window for one-hour a day and did not have to lift any package over 25 pounds. The record does not reflect that Dr. Thometz was aware of appellant's work limitations or that she was on limited duty. He did not address her limitations. It is well established that medical opinions based on an incomplete or inaccurate history are of diminished probative value.¹⁵

Finally, the Board notes that Dr. Robinson did not address the issue of whether appellant's employment activities caused her injury to her right shoulder.

Appellant argued on appeal that OWCP approved surgery on her right shoulder as well as other presurgery treatments. However, there is no evidence in the record that OWCP approved treatment for her right shoulder. The Board notes that appellant submitted new evidence and additional argument on appeal. However, the Board lacks jurisdiction to review this evidence for the first time on appeal.¹⁶

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁵ *M.W.*, 57 ECAB 710 (2006); *Douglas M. McQuaid*, 52 ECAB 382 (2001); *P.B.*, Docket No. 10-1127 (issued March 28, 2011).

¹⁶ 5 U.S.C. § 501.2(c)(1).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she sustained an injury to her right shoulder in the performance of duty, causally related to factors of her federal employment.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 15, 2010 is affirmed.

Issued: July 22, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board